Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Andrew T. Muraski,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

Jeffrey S. Sheridan
Counsel of Record
STRANDEMO, SHERIDAN & DULAS, P.A.
320 Eagandale Office Center
1380 Corporate Center Curve
Eagan, Minnesota 55121
(651) 686-8800

Counsel for Petitioner

2009 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED FOR REVIEW

Summary

Petitioner was arrested on suspicion that he was driving while impaired. After his arrest, police took Petitioner to the county jail where he was asked to submit to a breath test to determine his alcohol concentration under Minnesota's implied consent law. Petitioner refused to submit to a test and was later charged with driving while impaired. In addition, Petitioner was charged with a crime for refusing to submit a sample of his breath for analysis.

Petitioner moved to dismiss the refusal charge, alleging that the Minnesota's criminal refusal statute was unconstitutional. That motion was denied. Petitioner resolved the case by preserving his constitutional challenge for appeal.

Questions

1. Does a statute that makes it a crime to refuse to consent to a search for evidence of criminal activity by that person's accuser violate the person's Fourth Amendment rights?

2. Does that same statute violate the person's right to substantive due process?

3. Does that same statute violate the prohibition against unconstitutional conditions?

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State v. Muraski, A07-1705, Oct. 21, 2008, *rev. denied* (Minn. March 17, 2009) (unpublished opinion). The court of appeals' decision is not published. It is reproduced at App. 5.

Trial Court

The trial court's decision is not published. The trial court's order is reproduced in the Appendix at App. 1.

JURISDICTION

28 U.S.C. § 1257(a)

On December 23, 2008, the Minnesota Supreme Court granted Petitioner's petition for review of the Minnesota Court of Appeals decision and stayed all proceedings pending final disposition in *State v. Netland*, No. A06-1511. The Minnesota Supreme Court filed its opinion in *State v. Netland* on February 12, 2009. On March 17, 2009, the Minnesota Supreme Court issued an order vacating its prior order and denying the petition for further review. The Minnesota Supreme Court entered its judgment on April 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of a state's highest court that considers any title, right, privilege or immunity established or claimed under the Constitution of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV, UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

MINN. STAT § 169A.20, SUBD. 1(1), (5)

Subdivision 1. Driving while impaired crime. It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state:

(1) when the person is under the influence of alcohol;

* * * * *

(5) When the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more;

* * * * *

MINN. STAT § 169A.20, SUBD. 2

Subdivision 2. Refusal to submit to chemical test crime. It is a crime for any person to refuse to submit to a chemical test of the persons' blood,

breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

MINN. STAT. § 169A.51, SUBD. 1

Subdivision 1. Implied consent; conditions; election of test. (a) Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

(b) The test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:

(1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
(2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
(3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or

(4) the screening test was administered and indicted an alcohol concentration of 0.08 or more.

* * * * *

MINN STAT. § 169A.52, SUBD. 1, 3(a) and 7(a)

Subdivision 1. Test Refusal. If a person refuses to permit a test, then a test must not be given, but the peace officer shall report the refusal to the commissioner and the authority having responsibility for prosecution of impaired driving offenses for the jurisdiction in which the acts occurred. However, if a peace officer has probable cause to believe that the person has violated section 609.21 (criminal vehicular homicide and injury), a test may be required and obtained despite the person's refusal. A refusal to submit to an alcohol concentration test does not constitute a violation of section 609.50 (obstructing legal process), unless the refusal was accompanied by force or violence or the threat of force or violence.

* * * * *

Subdivision 3. Test refusal; license revocation. (a) Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and that the person refused to submit to a test, the commissioner shall revoke the person's license or permit to drive, or nonresident operating privilege, for a period of one year even if a test was obtained pursuant to this section after the person refused to submit to testing.

* * * * *

Subdivision 7. Test refusal; driving privilege lost. (a) On behalf of the commissioner, a peace officer requiring a test or directing the administration of a chemical test shall serve immediate notice of intention to revoke and of revocation on a person who refuses to permit a test or on a person who submits to a test the results of which indicate an alcohol concentration of 0.08 or more.

STATEMENT OF FACTS

In the early morning hours of December 10, 2005, Petitioner was arrested by a Newport, Minnesota police officer on suspicion that he was driving while impaired. Petitioner was then transported to the Washington County jail where he was asked to submit to a breath test to determine his alcohol concentration under Minnesota's "implied consent law."[1] Before requesting a test in Minnesota, police are required to read to the driver a form titled, Motor Vehicle Implied Consent Advisory (App. at 44).[2] After reading the advisory, the officer asked Petitioner, "Will you take the breath test?" Petitioner responded, "I will not."

Petitioner was later charged with driving while impaired[3] but because no evidentiary test was performed to quantify Petitioner's alcohol concentration, he was not charged under Minnesota's statute making it a crime to operate a motor vehicle with an alcohol concentration of .08 or more.[4] Instead, Petitioner was charged with a separate crime of refusing to submit to an alcohol concentration test under the implied consent law.[5]

Petitioner moved the district court to dismiss the criminal refusal charge arguing that, regardless of the state's ability to otherwise lawfully seize evidence of his alcohol concentration, the statute

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[1] *See generally* Minn. Stat. § 169A.50-53.
[2] Minn. Stat. § 169A.51, subd. 2.
[3] Minn. Stat. § 169A.20, subd. 1(1)
[4] Minn. Stat. § 169A.20, subd. 1(5).
[5] Minn. Stat. § 169A.20, subd. 2.

criminalizing his refusal to consent to the search for potentially incriminating evidence was unconstitutional. The district court denied Petitioner's motion in an order dated April 27, 2007 (App. at 1).

On the day of trial, Petitioner and the state agreed that if the state would dismiss the balance of the criminal complaint, Petitioner would waive his right to a jury trial on the refusal charge and allow the court to convict him based on stipulated facts. This procedure is necessary in Minnesota to preserve a defendant's right to appeal and is commonly referred to as a "*Lothenbach* trial."[6] The district court convicted Petitioner and he appealed to the Minnesota Court of Appeals. The Minnesota Court of Appeals filed its opinion on October 21, 2008, affirming Petitioner's conviction (App. at 5).

Petitioner then petitioned the Minnesota Supreme Court for further review and that request was granted in an order dated December 23, 2008 (App. at 11). In that same order, the Minnesota Supreme Court stayed all proceedings in Petitioner's appeal pending the final disposition in a case which raised similar issues that was pending before the court called *State v. Netland* (App. at 11).

On February 12, 2009, the Minnesota Supreme Court filed its decision in *Netland* (App. at 12).[7] As a part of the *Netland* decision, the supreme court upheld as constitutional the state's criminal

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[6] *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980).

[7] *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

refusal statute.[8] In an order dated March 17, 2009, the Minnesota Supreme Court vacated its December 23, 2008 order granting Petitioner's request for further review and denied that request (App. at 42). A final judgment was entered in the Minnesota Supreme Court on April 2, 2009 (App. at 43).

Petitioner now requests that this Court review and consider the constitutionality of a statute that makes it a crime for a person to withhold his consent to a search of his person for evidence that his accuser wishes to use against him in a criminal prosecution.

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[8] *Id.* at 211-14.

REASONS FOR GRANTING THE PETITION

I. The Minnesota Supreme Court has decided an important federal question that has not been, but should be, settled by this court.

The doctrine of substantive due process, which has evolved out of the English common law through Justice Field's dissent in *The Slaughter House Cases*,[9] teaches that the government may only use reasonable means to achieve reasonable ends under the Due Process Clause, and that the right to privacy (recognized in the penumbra) may stand against the intrusion of the state even beyond the proscription upon reasonable searches where it most directly operates.[10] This fundamental principle stems from the fact that ours is an accusatorial system and not an inquisitorial one. In the latter, defendants were routinely subjected to the Star Chamber and legally compelled to answer self-incriminatory questions.[11] As Justice Frankfurter noted, "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[12] The protections of both the Fourth

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[9] 83 U.S. 36 (1873).

[10] *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptives) and *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *compare Bowers v. Hardwick*, 478 U.S. 186 (1986) (private homosexual conduct).

[11] *See Andersen v. Maryland*, 427 U.S. 463 (1976); *Rogers v. Richmond*, 365 U.S. 534 (1961); *United States v. Rabinowitz*, 339 U.S. 56 (1950) (Frankfurter, J., dissenting)

[12] *Rogers*, 365 U.S. at 541.

and Fifth Amendment were born out of the cruelties of the inquisitorial system and the Star Chamber. As this Court has held:

> [t]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions. It reflects a dual purpose-protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him.[13]

It was a direct response to the injustices of the inquisitorial system that the constitutional protections contained in the Bill of Rights were enacted.[14] Our accusatorial system of justice exists to ensure that defendant's are not subjected to the cruel trilemma of self-accusation, perjury or contempt.[15] Unfortunately, in the arena of drunk driving,

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[13] *Davis v. United States*, 328 U.S. 582, 588 (1946) (internal citations omitted).

[14] *See Doe v. United States*, 487 U.S. 201 (1988); *Moran v. Burbine*, 475 U.S. 412 (1986).

[15] *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964). Many of the cases examining the history of our accusatorial system involve challenges raised under the Fifth Amendment right against self-incrimination. But this Court has held that the Fourth and Fifth Amendment enjoy an "intimate relation" and that "the philosophy of each Amendment and of each freedom is complementary to, although not dependent upon that of the other in its sphere of influence—the very least that together they assure in their sphere is that no man is to be convicted on unconstitutional evidence." *Mapp v. Ohio*, 367 U.S. 643, 656-657 (1961).

Minnesota has returned to the inquisition and now compels drivers to consent to searches of their person or be imprisoned for their failure to "volunteer" the evidence the state seeks.

Minnesota, like nearly all of her sister states, prohibits the operation of a motor vehicle while under the influence of alcohol or with an alcohol concentration of .08 or greater.[16] In an effort to encourage drivers to submit to testing to determine their alcohol concentrations, most states have employed, in one form or another, an implied consent law.[17] These laws, in their most basic form, condition licensure upon a driver's implied promise that, if lawfully called upon to do so, they would provide a sample of their blood, breath, or urine for the state to analyze and use against them in a prosecution for violating the state's prohibitions on impaired driving.[18] The term "implied consent" is derived from the notion that if a person accepts a license for the privilege to operate a motor vehicle within a state, their consent to submit to testing may be implied from that act alone.

Because the "consent" is not actual consent, a driver is typically afforded an opportunity to withdraw the consent at the time the test is being requested.[19] Even though this court has held that the government is probably entitled to seize evidence regarding alcohol concentration without a warrant,[20]

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[16] Minn. Stat. § 169A.20.

[17] *See, e.g.*, Minn. Stat. § 169A.50-53.

[18] Minn. Stat. § 169A.50, subd. 1.

[19] Minn. Stat. § 169A.52.

[20] *Schmerber v. California*, 384 U.S. 757 (1966).

most states have chosen to avoid confrontations between the officer and driver by providing that if the driver withdraws his or her consent at the time of testing, no test shall be performed.[21] However, if the driver chooses to withdraw his or her consent, it is under the penalty of the state withdrawing the driver's license for a period of time, typically through an immediate administrative license revocation or ALR.[22] Drivers are then typically afforded an opportunity to challenge whether their licenses were lawfully withdrawn through an administrative and/or judicial review process.[23]

In many states, Minnesota included, the basic implied consent law has been expanded to allow for immediate ALR not only for refusing to submit to an alcohol concentration test, but also for submitting to a test that reveals an alcohol concentration in excess of the state's prohibited level.[24] In essence, an additional promise is implied by accepting the license: the promise that the person will not operate a motor vehicle with an alcohol concentration of 0.08 or more. Once again, all states provide some form of administrative and/or judicial review for a driver to challenge such a revocation.[25]

For decades, Minnesota employed the leverage associated with ALR to encourage drivers to submit to an alcohol concentration test. For first time

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[21] *South Dakota v. Neville*, 459 U.S. 553 (1983); Minn. Stat. § 169A.52, subd. 1.
[22] Minn. Stat. § 169A.52, subd. 3, 4.
[23] Minn. Stat. § 169A. 53.
[24] Minn. Stat. § 169A.52, subd. 3, 4.
[25] Minn. Stat. § 169A.53.

offenders in Minnesota who submit to an alcohol concentration test that reveals an alcohol concentration of .08 or more, the person's license is revoked for a period of ninety days.[26] However, if that same driver were to refuse to submit to a test, his or her license would be revoked for a period of one year.[27] While these lengthy license revocations are often perceived by drivers as the most severe punishment they receive in their DWI case, they have generally withstood constitutional challenges as being appropriate remedial measures to advance the interests of gathering evidence for DWI criminal prosecutions and to protect the public from the perils of impaired drivers on the roadway.[28]

But the Minnesota legislature has taken the concept of "encouraging people to test" to an unconstitutional extreme by passing a law that not only subjects drivers to a one-year ALR, but also subjects them to a year in the county jail if they refuse to consent to a test. In other words, Minnesota has made it a crime to peacefully exercise one's constitutional right to withhold consent to a search of his or her person for evidence of a crime.[29] In fact, Minnesota has made the crime of test refusal a more serious crime than the crime of drunk driving.[30] It was at that point in its campaign to

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[26] Minn. Stat. § 169A.52, subd. 4(1).

[27] Minn. Stat. § 169A.52, subd. 3.

[28] *See Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 388 (Minn. Ct. App. 1993); *Neville*, 459 U.S. at 553.

[29] Minn. Stat. § 169A.20, subd. 2.

[30] Minn. Stat. §169A.20, subd. 2, Minn. Stat. § 169A.25, subd. 1, Minn. Stat. § 169A.26, subd. 1.

encourage testing that Minnesota left the constitutional rails.

In examining the constitutionality of this statute that criminalizes withholding consent to a search of a person's body, it is important to note what it is and what it is not. The statute is not a civil statute imposing consequences for non-compliance; other provisions of Minnesota's impaired driving code accomplish that. It is not an administrative regulation of a valid licensing power; other provisions do that as well. It is not an evidence regulating provision, making evidence admissible or inadmissible; the rules of criminal procedure deal with that. It is a criminal statute whose sole mission is to extract incriminating evidence upon pain of severe punishment. It says: consent to a search or go to jail. It says when you obtained your license or drove a vehicle (or even found yourself in circumstances giving a police officer probable cause to think you did), you impliedly gave up your right to the privacy of your body, and if you renege on that implied promise, we will not only revoke your privilege to drive, we will label you a criminal and imprison you, regardless of whether you are guilty of the other offense (DWI).

Because the ultimate goal of the refusal statute is to obtain physical evidence from a person's body, a search, this issue must be addressed in the context of the Fourth Amendment to the United States Constitution. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[31]

The taking of a blood, breath, or urine sample is a search as that term is defined in constitutional law.[32] Warrantless searches are presumed to be unreasonable.[33] A warrantless search is always illegal unless if fits into one of the narrowly-drawn exceptions to the warrant requirement. Minnesota has recently decided that the evanescent nature of alcohol creates a "single factor" exigent circumstance, negating the need for an officer to even consider the need for a warrant in driving while intoxicated cases.[34] The Minnesota Supreme Court concluded here that because the evidence sought by police in a DWI case could be extracted by force under the Fourth Amendment, the driver had no "right to refuse," and therefore, the state could compel the driver to consent to the test or face criminal conviction.[35]

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[31] U.S. Const, amend. IV.

[32] *Skinner v. Ry Labor Exec. Ass'n.*, 489 U.S. 602 (1989); *Schmerber*, 384 U.S. at 757.

[33] *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

[34] *State v. Shriner*, 751 N.W.2d 538 (2008) *cert. denied* 129 U.S. 1001 (2009).

[35] *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

But while the exigent circumstances exception to the warrant requirement may allow for the warrantless taking of the sample, it does not settle the question raised here of whether a driver can be prosecuted for refusing to consent to the search. This statute does not punish a person for forcibly resisting the collection of a sample to which the state may otherwise be entitled; it punishes a person for declining to utter the only statutorily acceptable answer when asked for consent to this evidentiary search—"yes."

If a driver courteously, non-violently, politely, and respectfully declines to relinquish a right, he or she is a criminal, to be punished more severely than would be for the suspected offense[36] and in addition to that punishment if convicted of both.[37] And it matters not if the driver was actually innocent or wrongly accused of the original suspected offense.[38] One of Minnesota's leading constitutional scholars wrote the following caution after this law was enacted:

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[36] In fact, the statute creates a perverse incentive for officers to induce a person to refuse. If the person refuses they will be charged with a more serious offense and the officer will be relieved of the burden of proving that the person was actually impaired, only that the officer had probable cause to believe so.

[37] Minn. Stat. § 609.035, subd. 2(a) allows a court to sentence a person convicted of both DWI and refusal to consecutive sentences under certain circumstances, regardless of whether the offenses arose out of the same course of conduct.

[38] The refusal law only requires that an officer have probable cause to request a test, not that the accused is actually guilty of driving while impaired. *State v. Olmscheid*, 492 N.W.2d 263 (Minn. Ct. App. 1992).

> An extreme example or two may be useful illustrations. No one doubts the legislature's power to forbid murder, and to punish it by any means that are not cruel or unusual. Suppose, however, the legislature were to amend the murder statute to provide that a person properly arrested upon probable cause for murder is guilty of a crime, carrying the same penalty (life in prison or even death), if he or she refuses upon request to turn over to police the weapon with which the homicide was allegedly committed. Suppose further, that it is irrelevant that the suspect is actually, demonstrably, innocent of the murder, that, indeed, no murder was committed at all, and even that no such weapon exists, despite the admitted existence of probable cause to the contrary. This is a fair analogue to the refusal statute, for in each the question turns, not upon whether the predicate crime was committed or can be proved, but solely upon whether probable cause existed, a request for (non-testimonial) evidence of it was requested after a valid request, and the request was refused. The hypothetical example surely gives us pause; why then does not the refusal statute?[39]

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[39] Henry W. McCarr & Jack S. Nordby, *Criminal Law and Procedure* § 56.10 (3d ed. 2001).

There can be no doubt that drunk driving is a serious issue that is rightly regulated by the state. But our accusatorial system requires that government's actions, even in responding to a serious crime, respect those liberties and rights that distinguish this society from most others.[40] Indeed, "it is a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people."[41]

The government may and should address the "carnage on the highways,"[42] but it must do so without doing carnage to the constitution. The government may attack drunk drivers, but in doing so, it may not attack fundamental liberties. This is precisely what the doctrine of substantive due process forbids. The Minnesota legislature can make it a condition of licensure that people waive their constitutional right to privacy with regard to their alcohol concentration while driving. The permissible remedy for withdrawn consent is, and always has been, the loss of that license—not jail.[43] But the Minnesota legislature cannot make a driver's decision to stand on his constitutionally protected right to privacy a crime in and of itself.

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[40] *See, Moran*, 475 U.S. at 436 (Stevens, J., dissenting)

[41] *Id.* (citing *Rabinowitz*, 339 U.S. at 69).

[42] *Neville*, 459 U.S. at 558.

[43] *See Wyman v. James*, 400 U.S. 309, 325 (1971) (Allowing warrantless search where refusal to consent to the search resulted in loss of AFDC benefits and noting that, if the refusal was made a criminal offense, the analysis would be different). *See* generally, Section II below.

The essence of an accusatorial system is that a suspect need do nothing to assist his accuser. The burden in this system is entirely upon the accuser and, although the suspect may not physically interfere with his accuser, he cannot be compelled to help his accuser. Minnesota has made it a crime to withhold willing assistance to one's accusers. This is the essence of inquisition. This cannot be allowed and this Court should intervene to reaffirm the sanctity of the accusatorial system of criminal justice. For these reasons, Petitioner respectfully requests that this Court grant certiorari in this case.

II. The Minnesota Supreme Court has decided an important federal question in a way that conflicts with the decisions of this court and other states.

While this Court has never directly addressed this exact issue, it has held that the assertion of one's rights under the Fourth Amendment cannot be a crime.[44] In 1950, this Court considered a District of Columbia law that criminalized refusing to allow for a health inspection without a warrant.[45] Ms. Little was convicted of refusing to unlock her door and allow a health officer to enter her home without a search warrant.[46] This Court held that "[t]he right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation

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[44] *Camara v. Mun. Court*, 387 U.S. 523, 532-33 (1967), *District of Columbia v. Little*, 339 U.S 1, 7 (1950).

[45] *Little*, 339 U.S. at 1.

[46] *Id.* at 2.

that would impose a criminal punishment on one who does nothing more than [Ms. Little] did here."[47]

This Court reaffirmed that refusal to peaceably consent to a search cannot be a crime in another housing inspection case in *Camara*, holding that refusing consent for an inspection cannot be a criminal offense.[48] On the same day this Court decided *Camara*, its holding was expanded to include business premises, as well as residences.[49] Federal and state courts have relied on *Camara* for the proposition that asserting the constitutional privilege to withhold one's consent to a search cannot be a crime.[50]

This Court has also considered whether an AFDC beneficiary can refuse a home visit by a caseworker without risking the termination of benefits.[51] There was no criminal penalty for refusing to permit the search; the only consequence was that the payment of benefits would cease.[52] In holding that the state could condition the receipt of benefits on allowing a home visit, this Court carefully

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[47] *Id.* at 7.

[48] *Camara*, 387 U.S. at 540.

[49] *See v. City of Seattle*, 387 U.S. 541, 546 (1967)

[50] *See United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (holding that it cannot be a crime or evidence of guilt to refuse to consent to entry and search); *Ramet v. State*, ___ P.3d ___, ___ (Nev. 2009) (holding that refusal to consent to a search cannot be a crime or used as evidence of guilt); *State v. Hoover*, 878 N.E.2d 1116, 1120 (Ohio Ct. App. 2007) *rev. granted* (Ohio May 7, 2008) (holding that refusal to submit to alcohol concentration testing cannot be criminalized).

[51] *Wyman*, 400 U.S. at 310-14.

[52] *Id.* at 325.

noted that "[i]f a statute made her refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* and *See* would have conceivable pertinency."[53]

Little, *Camara* and their progeny involve the refusal to consent to a search of a home or business. This case involves the equally sacrosanct right to refuse the search of one's body. The Fourth Amendment specifically provides for "the right of the people to be secure in their persons . . . ."[54] Further, this Court has long recognized that the taking of a biological sample has Fourth Amendment implications.[55] If it cannot be a crime to refuse to consent to the search of one's business or home, it certainly cannot be a crime to refuse consent to a search of one's body.[56]

Minnesota has decided this case in a way that is inconsistent with these holdings. The other few states that have considered this exact issue are divided. Not only are the states' decisions inconsistent, they have actually arrived at *opposite* conclusions while passing on the exact same federal constitutional questions.

In addition to Minnesota, the Alaska Court of Appeals has repeatedly held that the criminalization of alcohol concentration test refusal is not

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[53] *Id.*

[54] U.S. Const. amend. IV.

[55] *Skinner*, 489 U.S. at 615-16; *California v. Trombetta*, 467 U.S. 479, 481 (1984); *Schmerber*, 384 U.S. at 767; *Terry v. Ohio*, 342 U.S. 1, 9 (1968).

[56] *See Prescott*, 581 F.2d at 1351.

unconstitutional.[57] But the Ohio Court of Appeals recently concluded that "[t]he use of the implied-consent statute can constitutionally require one to consent to a warrantless search or face administrative consequences. It ***cannot*** require that one comply or face criminal sanctions."[58] This holding was based on the Ohio Supreme Court's previously announced prohibition against placing a defendant in the position of choosing between a warrantless search or facing criminal penalties,[59] which was based on this Court's holding in *Camara*.[60]

The Minnesota Supreme Court's decision in this case is also contrary to this Court's decisions regarding the prohibition against unconstitutional conditions. Applying this doctrine, "this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."[61] The

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[57] *McCracken v. State*, 685 P.2d 1275, 1277 (Alaska Ct. App. 1984) (Criminalizing refusal does not violate the Fourth Amendment or create an unconstitutional condition); *Svedlund v. Munic. of Anchorage*, 761 P.2d 378, 382-83 (Alaska Ct. App. 1983) (Punishing a refusal to take a breathalyzer test does not violate due process); *Jensen v. State*, 667 P.2d 188, 190 (Alaska Ct. App. 1983) (Statute criminalizing refusal does not violate substantive due process or the prohibition against cruel and unusual punishment).

[58] *Hoover*, 878 N.E.2d at 1120 (emphasis added).

[59] *Id.* (citing *Wilson v. Cincinnati*, 246 N.E.2d 666 (Ohio 1976)).

[60] *Camara*, 387 U.S. at 523.

[61] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). *See also Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583 (1926).

government may not deny a benefit to a person on a basis that infringes on constitutionally protected interests.[62] Such a condition is impermissible.[63]

The criminalization of test refusal places such an impermissible condition on the benefit of the receipt of a driver's license. It criminally punishes drivers for exercising their most basic constitutional right—the right to be secure in their own bodies and protected against compulsory production of evidence to be used against them.[64]

As stewards of the United States Constitution, this Court should be particularly concerned that other courts around the country are reaching opposite conclusions when interpreting the Constitution and the decisions of this Court. Additional guidance is clearly required. This case presents the perfect opportunity to lay these questions to rest before these statutes proliferate to other states. It also provides the opportunity to ensure that the Constitution is being applied equally to every person in the United States.

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[62] *Id.*

[63] *Id.*

[64] *Davis*, 328 U.S. at 587.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and review the decision of the Minnesota Supreme Court on these important constitutional questions.

Respectfully submitted,

STRANDEMO, SHERIDAN & DULAS, P.A.

Jeffrey S. Sheridan
Counsel of Record for Petitioner
320 Eagandale Office Center
1380 Corporate Center Curve
Eagan, Minnesota 55121
(651) 686-8800

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Court File No: K3-06-1589

State of Minnesota,

Plaintiff,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Andrew T. Muraski,

Defendant.

The above-entitled matter came on for a hearing before the Honorable Thomas G. Armstrong on February 28,2007 at the Washington County Government Center in Stillwater, Minnesota.

Defendant was present and represented by Jeffery Sheriden, Esq. No appearance was made on behalf of the State of Minnesota.

The Court allowed final argument by mail. Whereas, Defendant's submission due on March 23, 2007 and the State's response due on April 14, 2007. The Court took the matter under advisement as of April 23, 2007 once it received the submitted materials.

Based upon all the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. Defendant requests dismissal of the Complaint for two reasons. First, Defendant challenges constitutionally of Minnesota state statute §169A.20,subd. 2 on the grounds that it

violates the constitutional principal to substantive due process.

2. Second, Defendant moves to dismiss the gross misdemeanor changes against him because the enhanced charges are based solely upon two prior convictions for DWI at the time of the offense alleged in the Complaint. Defendant claims that the use of unchallenged license revocations for the purpose of penalty enhancement violates Defendant's right to due process of law.

CONCLUSIONS OF LAW

1. Minnesota statutes are presumed constitutional and this court upholds a statute against a constitutional challenge unless it proves unconstitutional beyond a reasonable doubt. See, *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 496 (Minn.,1997); *State v. Behl*, 564 N.W.2d 560 (Minn.,1997).

2. Statutes are presumed constitutional, and courts' power to declare statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. *In re Haggerty*, 448 N.W.2d 363, 264 (Minn. 1989).

3. The Minnesota Supreme Court has already addressed the constitutionality of the refusal statute and has found that the statute does not violate a defendant's right against self-incrimination, guaranteed by the Fifth Amendment of the United States Constitution and article I, section 7, of the Minnesota

Constitution. *State v. Mellett*, 642 N.W.2d 779, 783-784 (Minn. Ct. App. 2002).

4. The right-to-privacy and Fourth Amendment challenges have also been addressed by the Minnesota Supreme Court. "The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." ...The right to privacy, though, is not absolute. ..."When there is an allegation of interference by the state with a protected right of privacy," we must, "balance the interest in the privacy against the state's need to intrude on that privacy." Id. at 784.

5. The legislature has a compelling state interest in protecting state residents from drunk drivers, and an important part of the implementation of that interest is the testing of those whom officers have probable cause to believe have been drinking and are driving while impaired, that balancing test favors intrusion by the state on privacy rights held by appellant. Id. at 784. See, *South Dakota v. Neville*, 459 U.S. 553, 558-559, 103 S.Ct. 916, 919-920, 74 L.Ed.2d 748 (1983) (stating that the United States Supreme Court has long recognized the compelling state interest in highway safety).

6. In *State v. Dumas*, 587 N.W.2d 299, 302 (Minn. Ct. App. 1998). The Court analyzed *State v. Nordstrom* 331 N.W.2d 901 (Min. 1983) and found that the Minnesota Supreme Court in *Nordstrom* held that a criminal conviction in

which the defendant was not represented by counsel could not be used to enhance a subsequent DWI offense to a gross misdemeanor if the right to counsel was not properly waived. Id. See, *Nordstrom* at 905.

ORDER

1. Because the statutes are presumed constitutional, and courts' power to declare statute unconstitutional is exercised with extreme caution and only when absolutely necessary, this Court finds no compelling reason to declare the statutes unconstitutional as requested by Defendant.

2. Defendant's motion to dismiss on the issue of the unconstitutionality of statute M.S.A. § 169A.20, subd. 2 is DENIED.

3. Defendant's motion to dismiss the gross misdemeanor charge is DENIED.

4. All other motions not mentioned within are hereby DENIED.

5. That the Washington County Government Center shall serve a true and correct copy of this Order upon counsel for the above-named parties by U.S. Mail. Such mailing shall constitute due and proper service of this Order for all purposes.

BY THE COURT:

Dated: 4/27/07

s/_____
Hon. Thomas G. Armstrong
Judge of District Court

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1705

State of Minnesota,
Respondent,

vs.

Andrew T. Muraski,
Appellant.

Filed October 21, 2008
Affirmed
Worke, Judge

Washington County District Court
File No. 1(3-06-1589

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Greg T. Kryzer, Frederic W. Knaak, Knaak & Kantrud, P.A., 3500 Willow Lake Boulevard, Suite 800, Vadnais Heights, MN 55110 (for respondent)

Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., 320 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

WORKE, Judge

On appeal from a conviction for refusal to

submit to chemical testing, appellant argues that (1) the test-refusal statute violates his Fourth Amendment rights and his right to privacy, (2) the use of an unchallenged driver's license revocation to enhance a future alcohol-related driving charge is a violation of his due-process rights, and (3) the Minnesota standard for dealing with lost or destroyed evidence sets a higher standard than the federal counterpart. We affirm.

DECISION

Fourth Amendment

Appellant Andrew T. Muraski argues that the test-refusal statute, under which he was convicted, violates the Fourth Amendment prohibition against unreasonable searches and seizures. *See* Minn. Stat. § 169A.20, subd. 2 (2006) (making it a crime for a person to refuse to submit to a chemical test for intoxication). The constitutionality of a statute is a question of law, which is reviewed de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). A statute is presumed constitutional, and "will not be declared unconstitutional unless the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

This court has held that Minn. Stat. § 169A.20, subd. 2, does not violate an individual's Fourth Amendment rights. *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). This court has also held that Minn. Stat. § 169A.20, subd. 2, "neither authorizes an unreasonable search nor conditions a privilege on surrendering a constitutional right[.]" *State v.*

Netland, 742 N.W.2d 207, 215 (Minn. App. 2007), *review granted* (Minn. Feb. 27, 2008). The holdings in *Mellett* and *Netland* are dispositive of appellant's Fourth Amendment challenge to Minn. Stat. § 169A.20, subd. 2; therefore, his argument fails.

Right to Privacy

Appellant also argues that the test-refusal statute violates his constitutional right to privacy. The constitutionality of a statute is reviewed de novo. *Melde*, 725 N.W.2d at 102.

The Minnesota Constitution includes a right to privacy. *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987). "The right to privacy begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988). But the right to privacy is not without limitations. *See Minn. State Bd. of Health v. City of Brainerd*, 308 Minn. 24, 36, 241 N.W.2d 624, 631 (1976) (holding that an individual's right to bodily integrity, like other constitutional rights, is not absolute). When there is an allegation of interference by the state with a protected right of privacy, the court must balance the interest in the privacy against the state's need to intrude on that privacy. *R.S. v. State*, 459 N.W.2d 680, 689 (Minn. 1990).

The state has a compelling interest in protecting residents from intoxicated drivers. *See Netland*, 742 N.W.2d at 215 (stating that the test-refusal statute serves the state's compelling interest in protecting its residents from the "severe threat" that intoxicated drivers pose to the public health and safety). As a result, officers must be able to test those whom they have probable cause to believe have been

driving while impaired. The balancing test favors intrusion by the state on the privacy rights held by appellant. Because the state had probable cause to arrest appellant, the state has not violated his right to privacy.

Enhancement Using License Revocations

Appellant next argues that his prior unchallenged license revocations may not be used to enhance his sentence because doing so would violate his due-process rights. A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). The application of law to undisputed facts is a question of law, which this court reviews de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992).

"A person who violates section 169A.20 . . . is guilty of first-degree driving while impaired if the person: (1) commits the violation within ten years of the first of three or more qualified prior impaired driving incidents[.]" Minn. Stat. § 169A.24, subd. 1(1) (2006). A prior impaired-driving-related loss of license is a qualified prior impaired-driving incident for enhancement purposes. Minn. Stat. § 169A.03, subd. 22 (2006). A prior impaired-driving-related loss of license includes driver's license suspension, revocation, cancellation, denial, or disqualification. Minn. Stat. § 169A.03, subd. 21(a)(1) (2006). An individual is permitted to seek either administrative or judicial review of license revocations. Minn. Stat. § 169A.53, subds. 1, 2 (2006). Uncounseled civil findings may be used to enhance subsequent criminal charges. *State v. Dumas*, 587 N.W.2d 299, 302 (Minn.

App. 1998), *review denied* (Minn. Feb. 24, 1999).

Failure to seek administrative or judicial review of driver's license revocation does not prohibit the state from using the prior revocation to enhance subsequent alcohol-related driving charges. The United States Supreme Court has held "that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38, 107 S. Ct. 2148, 2155 (1987). This court relied on Mendoza-Lopez to hold that because a driver had the opportunity, albeit unexercised, for meaningful judicial review of the prior license revocation, using the revocation as an aggravating factor to support an enhanced DWI charge did not violate the driver's due-process rights. *State v. Coleman*, 661 N.W.2d 296, 301 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

Appellant had the opportunity to exercise his right to either an administrative or judicial review of his two prior driver's license revocations, but failed to do so. Therefore, the state may use the prior unchallenged revocations to enhance the current charge without violating his due-process rights.

Lost or Destroyed Evidence

Appellant argues that the Minnesota standard for granting relief based on lost or destroyed evidence sets a higher standard than the federal standard and that the Minnesota standard places an insurmountable burden on a party that has never had access to a piece of evidence.

The United States Supreme Court has held

that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Yougblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337 (1988). Under Minnesota law, courts look at whether the loss of the evidence by the state was intentional "to avoid discovery of evidence beneficial to the defense" and whether the evidence was exculpatory. *State v. Koehler*, 312 N.W.2d 108, 109 (Minn. 1981) (quotation omitted).

Appellant has presented no evidence to show that the loss of the booking video was intentional or that the evidence on the recording was exculpatory. Furthermore, appellant failed to demonstrate that the Minnesota standard is different from the federal standard. Thus, appellant's argument fails.

Affirmed.

STATE OF MINNESOTA
IN SUPREME COURT
A07-1705

State of Minnesota,
Respondent,

vs.

Andrew T. Muraski,
Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Andrew T. Muraski for further review be, and the same is, granted on the issue of whether the test-refusal statute is unconstitutional, and all proceedings are stayed pending final disposition in *State v. Netland*, No. A06-1511. The petition is denied as to all remaining issues.

Dated: December 23, 2008

BY THE COURT:

s/ _____
Alan C. Page
Associate Justice

STATE OF MINNESOTA
IN SUPREME COURT

A06-1511

Court of Appeals — Gildea, J.
Dissenting, Page, J.
Dissenting, Anderson, Paul H., J.
Dissenting, Meyer, J.

State of Minnesota,
Appellant,

vs.

Filed: February 12, 2009
Office of Appellate Courts

Jakklyn M. Netland,
Respondent.

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael J. Colich, Tania K.M. Lex, Colich & Associates, Minneapolis, Minnesota, for appellant.

Charles A. Ramsay, Daniel J. Koewler, Charles A. Ramsay & Assoc., PLLC, Roseville, Minnesota, for respondent.

SYLLABUS

1. Conviction for criminal test refusal under Minn. Stat. § 169A.20, subd. 2 (2008), did not deny respondent due process of law.

2. Minnesota's criminal test-refusal statute does not violate the constitutional prohibition against unreasonable searches because exigent circumstances created by rapidly dissipating evidence of blood-alcohol concentration justify the warrantless search.

Affirmed in part and reversed in part.

OPINION

GILDEA, Justice.

Respondent Jakklyn Netland challenged her conviction for second-degree criminal test refusal, arguing that her right to due process was violated by the manner in which the breathalyzer test was administered and that the criminal test-refusal statute violated her right to be free from unreasonable searches and seizures. Netland raised the due process issue to the district court, and that court rejected her argument. On appeal, Netland additionally raised the issue that the criminal test-refusal statute violated her right to be free from unreasonable searches and seizures. The court of appeals held that the criminal test-refusal statute does not violate the constitutional protection against unreasonable searches because the exigency exception to the warrant requirement permits a warrantless search for blood-alcohol content. *State v. Netland*, 742 N.W.2d 207, 214-15 (Minn. App. 2007). The court of appeals, however, reversed Netland's conviction, concluding that her right to due process was violated. *Id.* at 221. Because we hold that Netland's right to due process was not violated and that the criminal test-refusal statute did not result in an unconstitutional search, we reverse.

The record reveals that a police officer stopped Netland's car at approximately 1:45 a.m. on January 7, 2006, because he observed her driving erratically. Based on his observations, the officer thought Netland was under the influence of alcohol. After smelling alcohol on Netland's breath, observing her bloodshot eyes, and hearing her slurred speech, the officer asked Netland to step out of the car. Netland

steadied herself on the vehicle as she left the vehicle. The officer administered, and Netland failed, three field sobriety tests. The officer also offered a preliminary breath test that Netland declined.

The officer arrested Netland and took her to the nearby stationhouse, where he read her the implied-consent advisory required by Minn. Stat. § 169A.51, subd. 2 (2008).[1] Netland agreed that she understood all provisions of the advisory. After consulting with counsel, Netland told the officer that she would take a test because the attorney informed her that the consequences of refusal would be worse than the consequences of finding alcohol in her blood. Netland requested a blood test. The officer, however, informed Netland that he would administer a breath test. The officer testified that he usually requires a breath test for persons he suspects of driving under the influence because the breath test is easy to administer and returns immediate results.

The officer turned on the Intoxilyzer breath-testing machine and explained how the machine worked so Netland could take the test. Within moments of Netland's first attempted breath sample, the officer informed her that the reading on the machine indicated that she was not blowing and that if the machine timed out before she provided adequate breath samples, the result would be considered a refusal to take the test. Netland responded that she was trying to blow into the

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[1] Specifically, the advisory Netland received included that Minnesota law required her to take the chemical test, that refusal to take the test was a crime, and that she had the right to consult with counsel prior to submitting to the test. Minn. Stat. § 169A.51, subd. 2.

machine.[2] The Intoxilyzer registered that Netland made 19 attempts to give a sample, but none of those attempts registered as an adequate sample.

After the Intoxilyzer reported a deficient test, Netland asked to take the test again. The officer denied the request because he observed Netland "starting and stopping" while she made her attempts during the first test. Netland then asked to take an independent chemical test. The officer complied with this request and the record shows that Netland utilized a private agency to conduct a urine test. Lab analysis from the independent test indicated that Netland had a blood-alcohol concentration of 0.036 at the time that test was taken.

The State subsequently charged Netland with one count of second-degree test refusal, a gross misdemeanor, in violation of Minn. Stat. § 169A.20, subd. 2 (2008), which makes it "a crime for any person to refuse to submit to a chemical test." The State also charged Netland with one count of third-degree driving while impaired, a gross misdemeanor, in violation of Minn. Stat. 169A.20, subd. 1(1) (2008), which makes it "a crime for any person to drive . . . when the person is under the influence of alcohol."[3] A

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[2] The record established that the machine was programmed to run for four minutes and that at the end of the four-minute period, the machine would "time out" if a sample adequate to test was not provided.

[3] Netland's driving while impaired charge was a gross misdemeanor because she had a previous driving while impaired conviction from 2001, which operated as an aggravating factor. Minn. Stat. § 169A.26, subd. 1(a) (2008) ("A person who violates section 169A.20, subdivision 1 (driving while impaired crime), is guilty of third-degree driving while impaired if one aggravating factor was present when the violation was committed."); *see also* Minn. Stat. § 169A.03, subd. 3(1) (2008).

jury found Netland guilty of second-degree criminal test refusal, but not guilty of driving while impaired. Netland made a motion for a new trial, arguing that her right to due process was violated. The district court denied this motion.

On appeal, the court of appeals held that the test-refusal statute, Minn. Stat. § 169A.20, subd. 2, did not violate the constitutional protection against unreasonable searches. *Netland*, 742 N.W.2d at 215. But the court determined that Netland was willing to submit to a chemical test for the presence of alcohol and that the officer had therefore denied Netland a "meaningful opportunity to obey the law," in violation of her due process rights. *Netland*, 742 N.W.2d at 216, 221. We granted the State's petition for review on the due process issue. In its petition for review, the State framed the issue as follows: "Are a defendant's due process rights violated when the officer administering the test deems the defendant to have refused the test after the defendant fails to provide an adequate breath sample and when the officer thereafter does not offer an alternative test to the defendant?"[4] We also granted Netland's cross-

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[4] Because the court of appeals determined that due process is violated when a defendant is not given a meaningful opportunity to conform with the law, the court turned to a statutory analysis to determine what the law required from Netland. *Netland*, 742 N.W.2d at 217 ("To decide whether Netland was provided a meaningful opportunity to conform her conduct to the requirements of section 169A.20, subdivision 2, we must first determine what those requirements are."). As set forth below, we do not adopt the "meaningful opportunity to conform" standard the court of appeals utilized, and therefore it is not necessary for us to address the statutory interpretation question the court of appeals addressed. Moreover, Netland's motion for a new trial challenged the circumstances of the refusal on due

petition to review the constitutionality of the test-refusal statute under the Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota Constitution.

I.

We turn first to the question of whether Netland's right to due process was violated. Both the United States and Minnesota Constitutions afford criminal defendants due process of law. U.S. Const., Amend. XIV; Minn. Const. art. I, § 7. We review the constitutional issue of whether a defendant's right to due process was violated de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

Netland argues, and the court of appeals agreed, that her right to due process was violated in this case because she was not given a meaningful opportunity to obey the law. The court of appeals held that "[F]undamental fairness prohibits imposing criminal sanctions on a person who has been deprived of a meaningful opportunity to obey the law." *Netland*, 742 N.W.2d at 216.[5] But in adopting this

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process grounds. Netland did not argue to the district court or to the court of appeals that her conviction was inconsistent with the terms of the criminal test-refusal statute. The dissent argues that the statutory interpretation question it addresses should be resolved before the constitutional issue we address. But because Netland did not argue that her conviction conflicts with the statute, we conclude that the statutory interpretation question is better left for another case when the record on this question is developed at the district court.

[5] From this standard, the court of appeals turned to construe the law to which Netland must conform. *Netland*, 742 N.W.2d at 217. The dissent embarks on a similar journey. As noted above, we are not using this case as a vehicle to resolve the statutory interpretation question. But we do note at least one problem

standard, the court of appeals relied on cases that address the concept of due process within the context of a challenge that a criminal statute violates due process because the statute is unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (noting that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"), *State v. Christensen*, 439 N.W.2d 389, 390 (Minn. App. 1989) (addressing whether "Minn. Stat. §§ 152.093 and

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with the interpretation the dissent offers. After finding the statute ambiguous, the dissent would apply the rule of lenity and hold that a person to whom a breath test is administered cannot be prosecuted for test refusal unless that person is first offered an alternative type of test. The legislature has, however, already provided for those circumstances when an alternative test must be offered prior to action being taken against a driver. In Minn. Stat. § 169A.51, subdivision 3 (2008), the legislature gave the officer the authority to direct the type of chemical test to be administered and provided that "[a]ction may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered." Thus, under this provision, no alternative test need be offered to a driver who, like Netland, was administered a breath test. The dissent seemingly acknowledges that subdivision 3 applies to the criminal test-refusal statute. See *infra* at D-4 ("In section 169A.51, for example, the requirements for an implied-consent advisory, for *determining the type of test*, and for conducting a blood test could also be required under the criminal test refusal statute." (emphasis added)). Yet, the dissent then reads this provision out of the statute when it "narrowly read[s] [the criminal refusal statute] to require the availability of an alternative testing method if an inadequate breath test sample or deficient breath test are the only evidence of refusal." At least in this regard, the interpretation the dissent offers is internally contradictory and inconsistent with the principle of statutory construction that every provision in state law must be given effect. Minn. Stat. § 645.16 (2008).

152.01, subd. 18 [were] unconstitutionally vague on their face and as applied"). Netland makes no argument that the test-refusal statute is unconstitutionally vague, and as a result, the standard that the court of appeals created based on these cases is inapplicable here. Netland has not cited any case from any court that recognizes a "meaningful opportunity to obey the law" as a due process standard. We decline to recognize such a standard in this case. [6]

Netland argues, however, that her right to due process was violated because the circumstances of her breath test were unfair. Our precedent recognizes that the constitutional guarantees of due process in the United States and Minnesota Constitutions include substantive components prohibiting " 'certain arbitrary, wrongful government actions, "regardless of the fairness of the procedures used to implement them." ' " *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). These components include the right of "every criminal defendant . . . to be treated with fundamental fairness and 'afforded a meaningful

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[6] The court also cited *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 330 (Minn. 1991), but that case was not about due process. The case "involv[ed] whether an intentional act exclusion of a homeowner's liability policy applies to the conduct of an insured who, because of mental illness, may lack the capacity to form the intent to injure." *Id.* at 325. Finally, the court cited *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). In *Calder*, the court addressed "the prohibition against [the] making [of] any ex post facto laws." 3 U.S. (3 Dall.) at 389. Netland does not claim that the test-refusal statute is an ex post facto law. *See id.* at 390 (noting that a law "that makes an action done before the passing of the law, and which was innocent when done, criminal" is an ex post facto law).

opportunity to present a complete defense.' " *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (quoting *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992)). But, as the Supreme Court has noted, courts are "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *see also Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (noting that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation" and that the "category of infractions that violate 'fundamental fairness' [has been defined] very narrowly" to include only those that violate "the community's sense of fair play and decency"); *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' ").

As these cases recognize, the initial inquiry in any due process challenge is to identify the precise nature of the constitutional right asserted by the aggrieved party and the government conduct allegedly depriving the party of that right. *See Frank v. Maryland*, 359 U.S. 360, 363 (1959) ("Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests."), *overruled in part on other grounds by Camara v. Mun. Court*, 387 U.S. 523 (1967). Netland contends that her encounter with the officer administering the breath test at the law-enforcement

stationhouse violated her right to due process. Specifically, in her motion for a new trial, Netland argued that her right to due process was violated because "she was not given four minutes to supply an adequate [breath] sample." Netland expanded the grounds for her argument in her brief to the court of appeals, arguing that she "insisted she was not refusing to take the test and that [she] pleaded with [the officer] to let her take an alternative test."

Netland seems to advance two theories on which the conditions of her chemical test might be said to have violated her right to due process. She argues that the officer acted in bad faith by denying her access to the breath-testing machine before the machine completed its programmed four-minute cycle and by denying her a second test. Netland also argues that these same aspects of the police officer's behavior shock the conscience so as to make her conviction for test refusal unconstitutional. We examine each theory in turn.

We turn first to consideration of whether the officer acted in bad faith and thereby violated Netland's right to due process. We have recognized that a due process claim can be based on a government agent's bad faith, which can include an improper purpose motivating the government action. *See Kohn v. State ex. rel. Humphrey*, 336 N.W.2d 292, 297 (Minn. 1983) (stating that "an investigation . . . undertaken for an improper purpose, such as harassment, would violate due process"). In *State v. Larivee*, we considered whether an officer's denial of a defendant's request to obtain an independent blood-alcohol-concentration test after the defendant refused the state-offered test denied the defendant due process of law. 656 N.W.2d 226, 230 (Minn. 2003). We

rejected the defendant's due process challenge for denial of access to an independent test because "the denial of access [to an independent test], although deliberate, was made without animus and in accord with what the booking officer believed was the appropriate procedure." *Id.* at 231. The evidence in Larivee negating bad faith included the fact that the officer denied the defendant's request "during the routine booking process." *Id.* The officer in *Larivee* also correctly believed that only persons who had not refused the state-offered test were entitled to independent tests. *Id.*

The record in this case similarly reveals a lack of animus or bad faith. The officer testified that he denied Netland's request for an additional test because he had observed Netland "starting and stopping" during the first test, rather than providing a consistent breath necessary to yield a valid sample. The court of appeals stated that the record reflects that the officer terminated the test because he "felt she wasn't trying" and declined to grant her request for an alternative test because "it would lead to ... charging her with a test refusal." *Netland*, 742 N.W.2d at 217. But the court of appeals' conclusion reads the officer's testimony out of context. The officer's testimony indicates that the officer believed Netland attempted to manipulate the results of the first test and that, if he allowed another test, she would continue to do so. Netland was on notice, moreover, that failure to provide an adequate sample would lead to a test refusal charge because the officer explained at the beginning of the test that the machine's report of a deficient test constitutes a refusal. And at no point during the encounter at the stationhouse, which was recorded and played for the

jury, did Netland tell the officer she was having difficulty breathing or suffering from a medical condition that would hinder her ability to take the breath test. Here, as in *Larivee*, although the officer's denial of a second breath test was deliberate, the record does not reveal evidence of bad faith sufficient to support a due process violation.

We turn next to Netland's alternative argument—that the officer violated her right to due process because his behavior shocks the conscience. A defendant's right to due process has been held to be violated where the action of the government agent is such that it "shocks the conscience." *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' ..." (citations omitted)). A cognizable claim under this standard must describe "egregious" governmental conduct, and we have said that "[o]nly the most extreme instances of governmental misconduct satisfy this exacting standard." *Mumm v. Mornson*, 708 N.W.2d 475, 487, 490 (Minn. 2006) (holding that an officer's use of deadly force to stop a dangerous car chase did not shock the conscience because [a]n officer's poor judgment in using unreasonable force does not automatically convert the officer's acts into conscience-shocking conduct"). Such behavior has generally included acts with an intent to injure or cause harm. *Id.* at 487-88; *see also Rochin v. California*, 342 U.S. 165, 172 (1952) (concluding that police conduct shocked the conscience when officials entered a defendant's home unlawfully, used physical force against the defendant to pry pills from his mouth and, when unsuccessful, had the defendant's stomach pumped).

In this case, Netland contends, in essence, that the officer's decision not to offer an alternative test when she requested to take one shocks the conscience. We cannot agree that such behavior rises to the level of a constitutional violation. The officer did not use force or injure Netland when he did not administer another test. The implied-consent statute, moreover, allows an officer to choose which test to administer and does not require an alternative test when a breath test is refused. Minn. Stat. § 169A.51, subd. 3 (2008); *see also Larivee*, 656 N.W.2d at 232 (holding that denial of an independent chemical test after defendant refused to submit to a police-administered test did not violate due process). Finally, after the officer refused to administer another breath test to Netland, she was able to secure an independent test of her blood-alcohol content. Under these circumstances, the officer's denial of an additional breath test does not shock the conscience.

We have carefully reviewed the record in this case. The record shows that Netland was advised of her rights through the implied-consent advisory, and she admitted that she understood her rights. Netland was not prevented from offering a complete defense to the refusal charge; she testified at length as to her version of the facts and her claimed willingness to take another test. Netland also provided evidence during trial of the independent test she secured. To be sure, Netland argues that she did not refuse to take the test and that she wanted to continue trying to provide an adequate breath sample. This theory (and the evidence Netland offered to support it) presented a question of fact for the jury to decide, but it does not establish a violation of due process. Based

on our careful review of the record, we conclude that Netland's conviction for criminal test refusal is not fundamentally unfair, as our cases have addressed that concept, nor does it offend our "sense of fair play and decency." *Dowling*, 493 U.S. at 352-53. We hold that the circumstances of Netland's chemical test do not rise to the level of a violation of her right to due process.

II.

We turn next to the issue raised in Netland's petition for cross-review. Netland argues that the test-refusal statute violates her right to be free from unreasonable searches and seizures.[7] The constitutionality of a statute is a question of law that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). We presume that "Minnesota statutes are constitutional," and have said "that our power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). The challenging party "bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

Netland first argues that the breath test constitutes an unconstitutional search because the State impermissibly conditions her driving privileges on an unconstitutional, warrantless search for blood-alcohol content. The unconstitutional conditions doctrine originated in *Frost v. R.R. Comm'n of Cal.*, when the Supreme Court discussed the rights of

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[7] U.S. Const. amend. IV; Minn. Const. art. I, § 10.

foreign corporations to conduct business across state lines without heavy regulatory burdens that would effectively preclude commerce. 271 U.S. 583, 592 (1926). In *Frost*, the Supreme Court broadly stated that government may not grant a privilege on condition that the recipient forfeits a constitutional right:

> [A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94. The Supreme Court has further applied the doctrine in the context of privileges conditioned on infringement of individual liberty rights, such as First Amendment freedoms of speech, religious expression, and association. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (holding that a condition on becoming an independent contractor for a municipality unconstitutionally coerced relinquishment of an individual's right to political association). The application of this doctrine to other constitutional rights is less clear. *See Dolan v. City of Tigard*, 512

U.S. 374, 407 n.12 (1994) ("Although it has a long history, . . . the 'unconstitutional conditions' doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." (citation omitted)).

Principally, the unconstitutional conditions doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6-7 (1988). The doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement. *Council of Indep. Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300, 306 (Minn. 2006) ("[T]o invoke this 'unconstitutional conditions' doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their First Amendment rights."); *see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (concluding that the unconstitutional conditions doctrine does not apply to Congress' condition that law schools receiving federal funds may not deny access to ROTC program recruiters because the condition did not unconstitutionally infringe on the freedom of speech); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (declining to apply unconstitutional conditions doctrine to incarcerated individual's claim that a voluntary inmate interview coerced forfeiture of the right to remain silent because the interview did not violate

the Fifth Amendment). Therefore, in order to proceed with her claim, Netland must establish that the criminal test-refusal statute authorizes an unconstitutional search. Because, as set forth below, we conclude that Netland has not shown that a warrantless search for her blood-alcohol content would have been unconstitutional, we need not determine whether the unconstitutional conditions doctrine applies to Fourth Amendment rights or whether it should be applied to violations of the Minnesota Constitution.

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated..." The Minnesota Constitution contains a parallel provision. Minn. Const. art. I, § 10. Taking a sample of an individual's breath constitutes a search for purposes of the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (concluding that taking a blood, breath, or urine sample implicates the Fourth Amendment). But the Supreme Court has held that a warrantless search to determine whether a person was driving under the influence does not necessarily violate the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 772 (1966). We have recognized that warrantless searches are generally unreasonable. *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008). Certain exceptions apply to the warrant requirement, however, and the " 'ultimate touchstone of the Fourth Amendment is "reasonableness." ' " *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

Exigent circumstances provide one exception.[8] *Id.* at 541.

In *Shriner*, we held that the "rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe the defendant committed criminal vehicular homicide or operation." *Shriner*, 751 N.W.2d at 549-50. This conclusion rested squarely on our prior jurisprudence upholding warrantless searches if evidence would be destroyed during the time required to obtain a warrant. *Id.* at 548. We further recognized that in the case of dissipating alcohol, even the delay required to obtain a telephonic warrant creates an unreasonable burden for law enforcement to evaluate how much time must pass before the evidence disappears. *Id.* at 549.

Netland argues that *Shriner* does not compel a result in this case because the police in Shriner had probable cause to believe that Shriner committed criminal vehicular operation. *Id.* at 546, 548. The officer in this case did not have probable cause to believe that Netland had committed a felony when he

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[8] Consent provides another exception to the warrant requirement. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). Netland raises *State v. George*, 557 N.W.2d 575, 580 (Minn. 1997), for the proposition that consent must be freely and voluntarily given in order to abrogate the warrant requirement. Netland argues that the criminal sanctions imposed by the test-refusal statute nullify the voluntariness of submission to a chemical test. Because we are upholding the constitutionality of the search on other grounds, we do not address whether requiring a driver suspected of driving while impaired to submit to a chemical test necessarily coerces consent.

invoked the implied-consent statute.[9] But exigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search. It is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency, regardless of the criminal statute under which the person may be prosecuted.[10]

We reached a similar conclusion in *State* v.

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[9] In Minnesota, a charge of criminal test refusal follows only after the officer has complied with the procedural protections set out in the implied-consent law. Under the implied-consent statute, all drivers consent to a blood, breath, or urine test to determine the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(a) (2008). A peace officer may require a chemical test if the officer has probable cause to believe a person violates Minnesota's driving while impaired law and one of the following conditions is present: that person is arrested, is involved in a motor vehicle accident, refused a preliminary screening test, or provided a screening test sample with an alcohol concentration of 0.08 or more. Minn. Stat. § 169A.51, subd. 1(b). Upon requesting the test, the officer must present the person with the implied-consent advisory. *Id.*, subd. 2. The advisory explains, among other things, that the test is required, that refusal is a crime, and that the person has the right to consult an attorney. *Id.*, subd. 2(1)-(2) & (4).

[10] Netland argues that the possibility of extrapolated evidence taken from a later chemical test nullifies the concern of disappearing evidence during the time required to obtain a warrant. In *Shriner*, we declined to address this issue because the record did not adequately develop the possibility of presenting extrapolation evidence. *Shriner*, 751 N.W.2d at 549. Likewise, the record in this case does not develop the practicability or reliability of presenting evidence extrapolated from blood tests, nor the amount of time necessary to obtain such evidence. As such, we decline to comment on the relevance of extrapolated readings of blood-alcohol content to exigency created by dissipating blood-alcohol evidence.

Paul, 548 N.W.2d 260 (Minn. 1996). There, we concluded that vanishing evidence of blood-alcohol content justified a warrantless entry into the defendant's home because the officer pursued the defendant on probable cause of driving under the influence, a misdemeanor offense.[11] *Id.* at 267. Paul challenged the officer's entry into his home on grounds that the exigency exception would not apply for "an offense of lesser magnitude than a felony." *Id.* at 265. We declined to overturn precedent and to adopt a bright-line rule prohibiting warrantless entry of the home for such lesser offenses. *Id.* at 267. We then discussed the exigent circumstances raised by "the need to preserve evidence of Paul's blood alcohol level," and we compared the need to avoid destruction of blood-alcohol evidence in Paul to the need presented by a defendant suspected of committing several felonies. *Id.* at 266-67. We concluded that both cases "present[ed] similar compelling exigent circumstances," regardless of the underlying crimes. *Id.* at 267. We reach the same conclusion in this case. Whether the degree of the underlying offense constitutes a felony or a lesser crime is immaterial to the circumstances created by the dissipating blood-alcohol evidence.

Netland also argues that exigent circumstances do not justify the search in this case because the State did not show that concern for evanescent evidence motivated the officer to obtain Netland's blood-alcohol content without a warrant. But the constitutionality of a warrantless search is

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[11] The State prosecuted Paul for driving under the influence pursuant to Minn. Stat. § 169.121 (1998), *Paul*, 548 N.W.2d at 267, the predecessor to the 2008 statute for driving while impaired, section 169A.20, subdivision 1.

determined based on the objective facts of the case, and not the subjective motivation of the police officer involved. *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006); *State v. Olson*, 482 N.W.2d 212, 214 (Minn. 1992); *see also Shriner*, 751 N.W.2d at 540, 548 ("[R]apid dissipation of alcohol in the blood creates a single-factor exigent circumstance," notwithstanding the fact that the officer "admitted that he was not worried that [the defendant] was 'about to slip under the legal limit.' "). Thus, the officer's concern does not negate the relevant objective facts, namely the rapidly dissipating blood-alcohol evidence that creates the exigent circumstance.

We hold that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.[12]

Affirmed in part and reversed in part.

DISSENT

PAGE, Justice (dissenting).

I join in the dissent of Justice Meyer. I write separately to note that it is not clear to me how a person can violate the criminal test-refusal statute when they agree to take a test but have their request for a blood test denied.

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[12] Netland filed a motion in this court to supplement the record. We deferred Netland's motion until consideration of the appeal on its merits. Having considered the merits, we deny Netland's motion.

DISSENT

ANDERSON, Paul H., Justice (dissenting).

I join in the dissent of Justice Meyer. I write separately to express my concern about another facet of the majority opinion.

In *State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008), we held that the rapid, natural dissipation of alcohol in the blood creates a single-factor exigent circumstance that allows law enforcement to force the drawing of blood from a defendant when probable cause exists that the defendant has committed criminal vehicular homicide or operation under Minn. Stat. § 609.21 (2006). I joined Justice Meyer's dissent in Shriner because I agreed that the majority had created a new rule of law that eroded the rights of Minnesota citizens to be secure from unreasonable searches and seizures under the United States and Minnesota Constitutions. *See Shriner*, 751 N.W.2d at 550 (Meyer, J., dissenting).

Today I again dissent because I conclude that the majority has further eroded these rights by extending the single-factor exigency rule beyond criminal vehicular homicide and applying it to driving while intoxicated offenses. *State v. Netland*, ___ N.W.2d at ___ , slip op. at 18-20. For the same reasons set forth in the *Shriner* dissent, 751 N.W.2d at 550-57, I believe it is unwise to say that law enforcement is per se justified in taking blood-evidence evidence without a warrant in DWI cases. Rather, we should maintain our jurisprudence that requires the State, under a totality-of-the-circumstances analysis, to explain why law enforcement could have reasonably believed the

blood-alcohol evidence would disappear before a warrant could be obtained.

DISSENT

MEYER, Justice (dissenting).

I respectfully dissent. I would affirm the court of appeals, but on different grounds.

The majority opinion focuses on the issue as it was framed by the court of appeals: Were Netland's due process rights violated because she was not given a meaningful opportunity to obey the law? The majority should not decide a constitutional question when a ruling under the interpretation of a statute will answer the question of whether Netland refused to submit to a chemical test. *See State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise."). I would rely on the statutory framework in our driving while impaired and implied consent laws to conclude that Netland did not criminally refuse to submit to a chemical test and, therefore, her conviction must be reversed.

Netland's conviction rests on whether her actions constitute a criminal test "refusal" under Minn. Stat. § 169A.20, subd. 2 (2008). Statutory interpretation is an issue of law that is reviewed de novo. *State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007). When interpreting a statute, the goal is "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008). The best method of divining the legislature's intention is to rely on the plain language of the statute. *State v. Iverson*, 664 N.W.2d 346, 350-51 (Minn. 2003). When

the language is clear, we are bound to give effect to that language. *Id.* at 351 (citing *State v. Loge*, 608 N.W.2d 152, 156-57 (Minn. 2000)). If a criminal law is ambiguous, the rule of lenity requires us to construe the law narrowly. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) (citing *State v. Zeimet*, 696 N.W.2d 791, 794 (Minn. 2005)).

Our legislature has set out that any person who drives a motor vehicle within this state consents to a blood, breath, or urine chemical test to determine the presence of alcohol, if probable cause for driving while impaired exists. Minn. Stat. § 169A.51, subd. 1 (2008). Two distinct sanctions for refusing to submit to a chemical test have been set out by statute: a penalty for civil test refusal, and a penalty for criminal test refusal. The consequence for civil test refusal is the revocation of a person's license to drive. *Id.* § 169A.52, subd. 3 (2008). The penalties provided for a criminal test refusal are the same as those for impaired driving in the first, second, or third degree—imprisonment, fines, and license revocation. *Id.* § 169A.20; *see id.* §§ 169A.24-.276, 169A.54. A review of Netland's conviction triggers one question: what constitutes a criminal test refusal?

> The criminal driving while impaired statute states:
>
> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

Minn. Stat. § 169A.20, subd. 2. The statute does not define the word "refuse." The statute does, however,

reference sections 169A.51, the chemical tests for intoxication statute, and 169A.52, the civil penalty for chemical test refusal. I therefore look to those statutes to see how they inform the definition of "refusal" under the criminal test refusal statute.

Chemical tests for intoxication under both refusal statutes are governed by Minn. Stat. § 169A.51. This section states that any person who drives a motor vehicle in this state consents "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." *Id.*, subd. 1. The statute requires officers who request an individual to submit to a chemical test to give an implied consent advisory, *id.*, subd. 2, and lists several other conditions of the chemical test, such as who is qualified to administer a blood test, *see id.*, subd. 7.

The statute also sets out the administrative procedures of the chemical test. Section 169A.51, subd. 3, states that the officer "may direct whether the test is of blood, breath, or urine." The subdivision says that action may be taken against a person who refuses to take a blood test only if an alternative test was offered, and action may be taken against a person who refuses to take a urine test only if an alternative test was offered. *Id.* Similarly, a blood test or a urine test may be required after a breath test if there is probable cause to believe that the individual has used a controlled substance, but action can again be taken after a blood or urine test refusal only if the other type of test was offered. *Id.*, subd. 4.

These administrative procedures delineate what qualifies as an adequate breath test sample using a breath test instrument. *Id.*, subd. 5. Subdivision 5 contains several subparts that specify

certain circumstances of refusal, stating:

> (c) For purposes of section 169A.52 (revocation of license for test failure or refusal) ... failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal.
>
> (d) For purposes of section 169A.52 (revocation of license for test failure or refusal) . . . a breath test consisting of two separate, adequate breath samples within 0.02 alcohol concentration is acceptable. A breath test consisting of two separate, adequate breath samples failing to meet this criterion is deficient.
>
> (e) If the first breath test is deficient, as defined by paragraph (d), a second breath test must be administered.
>
> (f) Two deficient breath tests, as defined by paragraph (d), constitute a refusal.

The criminal test refusal statute also references section 169A.52. That section tells police officers how to report a test refusal or failure and allows officers to obtain a test despite a refusal if there is probable cause to believe criminal vehicular homicide has occurred. *Id.* § 169A.52, subds. 1, 2. Most of the section delineates the procedures and consequences surrounding a civil chemical test refusal or failure. *Id.*, subds. 3-8. License revocation is generally the civil punishment for test refusal or failure. *Id.*

Although section 169A.20, subd. 2, references both sections 169A.51 and 169A.52, it is silent as to what parts of those sections should be incorporated into the criminal test refusal statute. Some

components of those sections would not make sense if incorporated into criminal test refusal; the most obvious example is the detailed procedures and consequences for a civil test refusal. *See* Minn. Stat. § 169A.52. Several other components could transfer more easily. In section 169A.51, for example, the requirements for an implied-consent advisory, for determining the type of test, and for conducting a blood test could also be required under the criminal test refusal statute. In section 169A.52, the subdivision that allows an officer to automatically obtain a test on suspicion of vehicular homicide could also be applied to criminal test refusal.

Only one subdivision of the chemical tests for intoxication statute is expressly excluded from being incorporated into the criminal test refusal statute. Section 169A.51, subd. 5(c) and (d), clearly state that in those provisions, an inadequate or deficient breath sample is a refusal only "for the purposes of 169A.52," the civil test refusal penalty. Under the plain wording of the chemical tests for intoxication statute, the legislature did not extend criminal liability to "refusals" based on inadequate breath samples or deficient breath tests.

Beyond this, the definition for criminal test refusal has not been well articulated by the legislature—the criminal statute is silent regarding whether criminal consequences exist when an individual refuses only to take a breath test. The statute is also silent as to what constitutes a breath test refusal that violates the criminal refusal statute. The clear exclusion of inadequate or deficient breath tests further muddles the definition of criminal refusal: while an inadequate or deficient breath test does not constitute criminal refusal, the statute does

not speak to the criminal implications of an individual's inability or unwillingness to submit to a breath test.

Therefore, I would submit that the meaning of refusal under the criminal statute is ambiguous. Ambiguous criminal statutes are interpreted in congruence with the rule of lenity, which posits that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' towards the defendant." *State v. Orsello*, 554 N.W.2d 70, 74 (Minn. 1996) (citations omitted), *superseded by statute on other grounds*. In considering both the limiting language of section 169A.51, subd. 5(c) and (d), and the rule of lenity, I conclude that the criminal refusal statute must be narrowly read to require the availability of an alternative testing method if an inadequate breath test sample or deficient breath test is the only evidence of refusal. This is not to say that the officer must offer all three tests to a person in every criminal refusal scenario—the use of the disjunctive word "or" defeats such a reading. *See Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008). My interpretation of the test refusal statute instead narrows the issue: whether Netland's refusal conviction can be upheld when failure to provide an adequate breath test is not considered criminal refusal.[1] In reviewing whether the evidence is sufficient to uphold a conviction, we are required to "make a painstaking review of the record to determine whether the evidence and reasonable

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[1] In her appeal to the court of appeals, Netland argued that the record was insufficient to support her conviction for criminal refusal to submit to a breath test. I reach the statutory interpretation question based on this argument that Netland asserted.

inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 47677 (Minn. 2004).

Even when viewed in a light most favorable to the verdict, the evidence does not support a conviction under the narrow interpretation of the criminal refusal statute I have set forth.[2] Officer Hagen ended Netland's chemical test on the basis of Netland's deficient breath test, and his belief that Netland was trying to manipulate the machine. Netland requested an alternative test from Officer Hagen and then hired a private agency to conduct a urine test. Although the events surrounding her breath test could fall under the civil test refusal penalty, the facts in this case do not contain any evidence of refusal other than inadequate breath samples, a deficient breath test, and testimony that Netland was not trying to provide an adequate sample. An inadequate sample or deficient breath

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[2] In a footnote, the court of appeals concluded that Netland had refused under the criminal test refusal statute. *Netland*, 742 N.W.2d at 221 n.5. Reviewing the issue for sufficiency of the evidence, the court concluded that it would have to assume that the jury believed Officer Hagen's testimony that Netland was attempting to prevent the machine from accurately measuring the alcohol concentration in her breath. *Id.* This would constitute criminal test refusal as the court of appeals construed the statute, but I have articulated a narrower standard for criminal test refusal than the court of appeals.

test, which constitutes a refusal under the civil test refusal statute, cannot be the sole basis for a factfinder to also find th criminal test refusal statute was violated—to hold differently would go against the plain wording of the chemical tests for intoxication statute.

I would affirm, on different grounds, the court of appeals' decision to reverse the district court's conviction of criminal test refusal.

PAGE, Justice (dissenting).

I join in the dissent of Justice Meyer.

ANDERSON, Paul H., Justice (dissenting).

I join in the dissent of Justice Meyer.

STATE OF MINNESOTA
IN SUPREME COURT

A07-1705

State of Minnesota,
Respondent,

vs.

Andrew T. Muraski,
Petitioner.

ORDER

By order filed December 23, 2008, this court granted the petition for further review in the above-captioned matter and stayed all proceedings pending final disposition in *State v. Netland*, No. A06-1511. The court filed its decision in *State v. Netland* on February 12, 2009.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the December 23, 2008, order is vacated and the petition of Andrew T. Muraski for further review be, and the same is, denied.

Dated: March 17, 2009

BY THE COURT:

s/
Alan C. Page
Associate Justice

STATE OF MINNESOTA JUDGMENT

State of Minnesota, Respondent, vs.
Andrew T. Muraski, Appellant Court of Appeals

Appellate Court # A07-1705

Trial Court # K3-06-1589

Pursuant to a decision of Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Washington County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: April 2, 2009

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: s/ _____
Assistant Clerk

ICR 105903742

MOTOR VEHICLE
IMPLIED CONSENT ADVISORY

Time Started 322 Location read: Stillwater / Washington Co Jail

Andrew Timothy Murasky (person arrested), I believe you have been driving, operating or controlling a motor vehicle in violation of Minnesota's D.W.I. laws and "you have been placed under arrest for this offense" or ~~"you have been involved in a motor vehicle accident resulting in property damage, personal injury, or death."~~

✓ (Check when read) 1. Minnesota law requires you to take a test to determine:
(Check applicable portion when read)

✓ a.) If you are under the influence of alcohol,

✓ b.) if you are under the influence of hazardous or controlled substances or to determine the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols.

✓ (Check when read) 2. Refusal to take a test is a crime.

(Check if read) 3 ~~(READ ONLY IF PROBABLE CAUSE TO BELIEVE VIOLATION OF CRIMINAL VEHICULAR HOMICIDE AND INJURY LAWS) Because I also have probable cause to believe you have violated the criminal vehicular homicide or injury laws, a test will be taken with or without your consent.~~

✓ (Check when read) 4. Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be made available to you. If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time.

✓ (Check when read) 5. If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test.

Do you understand what I have just explained? "I Do"

Do you wish to consult with an attorney? "I would like to"

Time telephone made available: Start: 323 Stopped: 326

SAMple time: (Refused)

Will you take the (Breath) (Blood or Urine) test? "I will Not"

(If person refuses.)

What is your reason for refusing? "I believe I'm under the legal limit but I'm Driving After Revocation".

Name of Officer: Allan Olson (PRINT name of officer) Time Completed: 327

Date: 12/10/05